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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

LOWER PASSAIC RIVER STUDY AREA COOPERATING PARTIES GROUP, *Plaintiff,* vs. U.S. ENVIRONMENTAL PROTECTION AGENCY, *Defendant.*	HON. JOSE L. LINARES *Civil Action No.* 15-cv-7828 (JLL)(JAD)

PLAINTIFF LOWER PASSAIC RIVER STUDY AREA COOPERATING PARTIES GROUP'S MEMORANDUM OF LAW IN OPPOSITION TO EPA'S MOTION FOR SUMMARY JUDGMENT

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Plaintiff, the Lower Passaic River Study Area Cooperating Parties Group ("CPG"), hereby responds to Defendant United States Environmental Protection Agency's ("EPA's") Motion for Summary Judgment. EPA's motion should be denied because genuine issues of fact remain whether EPA has properly withheld information responsive to the CPG's requests for records under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 522. Limited discovery is therefore warranted.

INTRODUCTION

EPA is improperly withholding documents that might provide an understanding of the $1.4 billion remedy it ordered for the Lower Passaic River in March 2016. EPA has claimed the planned bank-to-bank dredging of 3.5 million cubic yards of river sediment is "one of the largest Superfund projects in EPA history."[1]

EPA's chosen remedy raises many questions, beginning with why EPA did not follow its normal Superfund process of completing a remedial investigation / feasibility study ("RI/FS") and using that study as the basis to select a remedy. In 2007, EPA entered into a settlement agreement with the CPG for the CPG to take over and complete a RI/FS that EPA and another private party had been unable to finish after almost 15 years. EPA advised the CPG that the RI/FS was essential to the cleanup of the Passaic River and necessary before a final remedy could be selected. Unknown to the CPG, even before it directed the CPG to perform the RI/FS the EPA had been working with the NJDEP and other agencies outside the normal Superfund statutory and regulatory process to impose a pre-determined remedy that is based on economic and political grounds, rather than CERCLA-authorized, science-based factors. Copies of documents reflecting communications and the agreement between the EPA and other agencies on

[1] EPA Press Release, *EPA Finalizes Passaic River Cleanup; One of the Largest Superfund Projects in EPA History Will Protect People's Health and the Environment*, March 4, 2016, available at https://yosemite.epa.gov/opa/admpress.nsf/0/DB3D10F149C262CC85257F6C005EE7F1.

critical elements of the remedy design before the RI/FS was even commenced have been obtained by the CPG from other sources, but have not been produced by the EPA in response to the CPG's FOIA requests. EPA even claims that it decided to implement the FFS before the CPG took over the RI/FS in 2007.[2]

After spending more than $130 million, the CPG submitted to EPA the RI/FS for the entire 17 miles of the Lower Passaic River in Spring 2015.[3] But EPA did not wait for the CPG to finish the RI/FS to select a remedy, nor did it take advantage of all the data the CPG gathered. Instead, EPA did an end-run around the RI/FS by preparing and finalizing an 8.3-mile "Focused Feasibility Study" that covers half of the lower river and that orders a technically questionable, costly, and massive river bank-to-bank dredge-and-cap remedy. Significantly, the FFS remedy is consistent with the back channel agreement between the EPA, NJDEP and other agencies before the RI/FS process even started.

Because of the large scale of that remedy, and the unprecedented action by EPA to moot the $130 million RI/FS that it required, the CPG has made reasonable attempts to gather information to understand EPA's actions and ensure that a complete administrative record is prepared. In response, EPA has worked diligently for several years to avoid producing all

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[2] "[I]n 2006, the EPA concluded that, since the Lower 8.3 Miles contain the bulk of the contaminated sediment, addressing this portion of the river first would better support the overall protection of human health and the environment than would awaiting the outcome of the 17 Miles RI/FS to make a decision for the entire Lower Passaic River." Mugdan Decl. ¶ 10 (emphasis added).

[3] The RI/FS is based on a thorough evaluation of more than 12,000 samples and 2.5 million contaminant measurements generated since 2004. Unlike the Focused Feasibility Study RI, which originally was intended only as an "early action," the RI/FS considers all of the RI/FS data and presents viable remedial options based on LPRSA-specific data. The RI/FS represents the only complete, and comprehensive, technically sound evaluation of the LPRSA data.

documents responsive to the CPG's FOIA requests. In addition to the CPG's four FOIA requests,[4] the CPG filed four corresponding administrative appeals, on which EPA never ruled.[5]

A federal agency withholding requested records bears the burden of justifying the withholdings. Despite their length, EPA's *Vaughn* index and declaration included with its motion still leave many glaring holes and little more than generalizations and conclusory statements. EPA's material supporting its motion is a mile wide and an inch deep. Many genuine issues of material fact remain, including:

- EPA's inadequate search. Pursuant to its legal obligations, EPA should have collected all potentially responsive work-related documents, whether sent by official e-mail accounts or personal e-mail accounts. The CPG also expressly requested certain e-mails sent by any EPA personnel from a personal e-mail account. Yet EPA's declaration addresses only a single personal e-mail account of Ms. Judith Enck; according to the *Vaughn* index, multiple EPA personnel used their personal e-mail account for official business. Furthermore, the declaration is inaccurate. Although it claims that no responsive e-mails exist on Ms. Enck's personal e-mail account that purportedly was searched, EPA has produced responsive e-mails from this personal account to another FOIA requestor. As another example of inadequacy, the declaration provides a vague description of the search process that does not identify custodians from whom EPA collected documents.

- EPA's failure to provide adequate information for certain requested records. Some documents on the *Vaughn* index do not identify the author, sender, recipient, or subject matter of the document; only the date is provided. Other documents only contain a vague subject matter description, such as "Passaic."

- EPA's misapplication of the deliberative process privilege. EPA has withheld factual information, such as raw data and model outputs, and only offered conclusory statements to support its withholding. EPA also has withheld documents created after the deliberation was over or the final decision had been made or after withheld materials were incorporated into the final decision.

- EPA's misapplication of the attorney-client privilege. EPA does not identify the position or title of senders or recipients, making it impossible to know whether the

[4] *See* Pl.'s Supp. Stmnt. of Material Facts Not in Dispute ("Pl.'s Supp. SOMF") ¶¶ 1-3, 10-11, 19-22, 34-36. For background on and facts surrounding the FOIA requests and subsequent administrative appeals, see Pl.'s Supp. SOMF and the accompany affidavits and exhibits.

[5] *See* Pl.'s SOMF ¶¶ 7-9, 16-18, 32-33, 40-41.

attorney-client privilege applies. EPA improperly withheld at least one document, sent to the State of New Jersey, under the attorney-client privilege.

- EPA's misapplication of the law enforcement privilege. EPA did not compile the requested documents for law enforcement purposes or demonstrate an adequate "articulable harm" necessary to establish the privilege. Moreover, EPA did not create the withheld documents for law enforcement purposes.

Sadly, this is not the first time EPA has run afoul of FOIA. Senior EPA officials have attempted to evade FOIA by using secret official e-mail addresses,[6] personal e-mail addresses,[7] and text messages.[8] Other EPA employees met with lobbyists at cafes and parks near EPA, so the lobbyists' names would not appear on EPA visitor logs.[9]

FOIA litigation and discovery have been necessary to reveal some of these abuses. EPA leaders "may have purposely attempted to skirt disclosure under FOIA," suspected one court handling FOIA litigation concerning whether EPA delayed issuing regulations until after an election. *Landmark Legal Foundation v. E.P.A.*, 959 F. Supp. 2d 175, 184 (D.D.C. 2013). Following discovery, the court concluded, "Either EPA intentionally sought to evade Landmark's lawful FOIA request so the agency could destroy responsive documents, or EPA demonstrated apathy and carelessness toward [the] request." *Landmark Legal Foundation v. E.P.A.*, 82 F. Supp. 3d 211, 213 (D.D.C. 2015). In general, observed the court: "EPA continues

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[6] *See, e.g.*, Julian Hattem, *Former EPA Chief Under Fire for New Batch of 'Richard Windsor' Emails*, THE HILL, May 1, 2013, available at http://thehill.com/regulation/energy-environment/297255-former-epa-chief-under-fire-for-new-batch-of-richard-windsor-emails.

[7] *See, e.g.*, Emily Yehle, *New Trove of Emails Shows Jackson Used Personal Account for Official Business*, E&E PUBLISHING, Aug. 14, 2013, available at http://www.eenews.net/stories/1059986010; Mark Flatten, *Acting EPA Head, Regional Official Ensnared in Windsorgate Email Scandal*, WASHINGTON EXAMINER, Feb. 20, 2013, available at http://www.washingtonexaminer.com/acting-epa-head-regional-official-ensnared-in-windsorgate-email-scandal/article/2521960.

[8] *See, e.g.*, S.A. Miller, *Subpoena Proper After EPA Chief Gina McCarthy Deletes Nearly 6,000 Text Messages, Experts Testify*, WASHINGTON TIMES, Mar. 26, 2015, available at http://www.washingtontimes.com/news/2015/mar/26/subpoena-proper-after-epa-chief-gina-mccarthy-dele/.

[9] H. Sterling Burnett, *So Much for President Obama's Pledge to Transparency*, FORBES, Mar. 2, 2016, available at http://www.forbes.com/sites/realspin/2016/03/02/so-much-for-obamas-pledge-to-transparency/#2eb8f9286abc.

to demonstrate a lack of respect for the FOIA process." *Id.* at 227. In another FOIA lawsuit regarding whether EPA pre-determined a mine decision, a court found, "The problem is that [EPA] withheld documents in full that it should have released in redacted form." *Pebble Ltd. P'ship v. E.P.A.*, No. 3:14-cv-0199-HRH, 2016 WL 128088, at *3 (D. Alaska Jan. 12, 2016).

EPA's obstruction is understandable given what has been revealed when EPA has been forced to disclose documents. EPA has been caught colluding with environmental activists to write regulations,[10] respond to studies adverse to EPA's desired action,[11] plan public hearings,[12] and prepare congressional press statements,[13] among many other inappropriate activities.

The CPG has attempted to develop a complete administrative record for EPA's decision. Yet EPA has repeated its strategy of delay, deny, and obstruct. Well before the CPG submitted its FOIA requests in 2014, EPA entered into an agreement with other federal and state agencies that dramatically attempts to change the FOIA framework and obligations. For example, the agreement allows any Party to object to release of any document sought under FOIA. This effectively provides multiple New Jersey state agencies with veto power over any EPA interpretation of FOIA and enables them—not the United States—to be the final arbiter of what

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[10] Majority Staff Report, United States Senate Committee on Environment and Public Works, "Obama's Carbon Mandate: An Account of Collusion, Cutting Corners, and Costing America Billions," Aug. 4, 2015, available at https://www.epw.senate.gov/public/_cache/files/386eb25d-b723-4ffd-9fcf-218425a33191/epw-staff-report-obama-carbon-mandate.pdf.

[11] Lachlan Markay, *Emails Show Steyer-EPA Coordination to Undermine Agency Critics*, WASHINGTON FREE BEACON, Jan. 27, 2016, available at http://freebeacon.com/issues/emails-show-steyer-epa-coordination-to-undermine-agency-critics/.

[12] Lachlan Markay, *Emails Show Extensive Collaboration Between EPA, Environmental Orgs*, WASHINGTON FREE BEACON, Jan. 15, 2014, available at http://freebeacon.com/issues/emails-show-extensive-collaboration-between-epa-environmentalist-orgs/.

[13] Energy & Environmental Legal Institute Report, "Improper Collusion Between Environmental Pressure Groups and the Environmental Protection Agency as Revealed by Freedom of Information Act Requests, 79, Sept. 2014, available at http://eelegal.org/wp-content/uploads/2014/09/EE-Legal-FOIA-Collusion-Report-9-15-2014.pdf.

should be released under FOIA.[14] FOIA never contemplated such state agency control over a federal agency.

In addition, the agreement preemptively and arbitrarily decides that all predecisional drafts of studies, reports, or analyses shall be labeled prominently on the first page as "DRAFT," and deemed confidential, unless and until the Parties agree to the document's release. Perhaps not surprisingly, EPA relies on this agreement as a basis for withholding certain documents. However, as a non-party to this agreement, the CPG should not be prevented from obtaining responsive documents that should otherwise be released under FOIA.

EPA's motion for summary judgment should be denied because many genuine issues of material fact remain. EPA has failed to meet its burden of justifying its nondisclosure of requested records. The CPG therefore respectfully asks the Court for the following relief:

- Deny EPA's motion for summary judgment;
- In light of EPA's inadequate and non-responsive approach, require EPA at this time to produce all identified responsive documents in un-redacted form;
- Allow the CPG to take limited discovery to develop the factual record to determine the universe of withheld records, the scope of EPA's clearly inadequate search, and properly assess the applicability of the claimed exemptions; and
- Require EPA to submit a sufficient declaration and *Vaughn* index.

ARGUMENT

I. Legal Standards

Summary judgment is appropriate only when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a

[14] Though not at issue in this litigation, after the New Jersey Department of Environmental Protection ("NJDEP") made available documents for the CPG's review and copying, NJDEP cited the agreement in an effort to claw back some of the documents obtained by the CPG. At the request of NJDEP, EPA struck these documents from the administrative record for its Record of Decision.

matter of law." Fed. R. Civ. P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

The purpose of FOIA is "to facilitate public access to Government documents." *U.S. Dep't of State v. Ray*, 502 U.S. 164, 173 (1991). "The Act creates a strong presumption in favor of disclosure . . . and requires the district court to conduct a *de novo* review of a government agency's determination to withhold requested information." *Davin v. U.S. Dep't of Justice*, 60 F.3d 1043, 1049 (3d Cir. 1995) (citing *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976)), *holding modified on other grounds by Abdelfattah v. U.S. Dep't of Homeland Sec.*, 488 F.3d 178 (3d Cir. 2007). Congress enacted FOIA "to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny." *Pub. Citizen, Inc. v. Office of Mgmt. and Budget*, 598 F.3d 865, 869 (D.C. Cir. 2010) (quoting *Rose*, 425 U.S. 352 at 360-61.)

The defendant agency has the burden of justifying nondisclosure. *See* 5 U.S.C. § 552(a)(4)(B); *Al-Fayed v. CIA*, 254 F.3d 300, 305 (D.C. Cir. 2001). The "agency must show, viewing the facts in the light most favorable to the requester, that there is no genuine issue of material fact." *Steinberg v. U.S. Dep't of Justice*, 23 F.3d 548, 551 (D.C. Cir. 1994). Summary judgment will not lie for the agency in a FOIA action where agency affidavits are conclusory and "do not provide information specific enough to enable [the requester] to challenge the procedures utilized." *Weisberg v. Dep't of Justice*, 705 F.2d 1344, 1348 (D.C. Cir. 1983) (quoting *Weisberg v. U.S. Dep't of Justice*, 627 F.2d 365, 371 (D.C. Cir. 1980)).

Genuine issues of material fact remain regarding whether EPA has withheld non-privileged documents and whether EPA has met its burden of justifying the withholdings under the claimed FOIA exemptions. EPA's motion for summary judgment must therefore be denied.

II. EPA's *Vaughn* Index and Declaration in Support of Its Asserted FOIA Exemptions Are Insufficient to Justify EPA's Withholding of Requested Records Because They Lack the Requisite Specificity.

Under FOIA, a federal agency must fully disclose all requested records unless an enumerated exemption applies. *Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 7 (2001). These limited exemptions "do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the [FOIA]," and thus the exemptions are given a narrow interpretation. *Id.* at 7-8 (quoting *Rose*, 425 U.S. at 361); *see also FBI v. Abramson*, 456 U.S. 615, 630 (1982) (FOIA exemptions are to be "narrowly construed").

A federal agency withholding records has the burden of proof to show that a claimed exemption applies. *Pub. Citizen, Inc.*, 598 F.3d at 869. The agency will not satisfy this burden through conclusory assertions. 5 U.S.C. § 552(a)(4)(B); *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 861 (D.C. Cir. 1980). Agencies normally submit a *Vaughn* index describing the reasons why the asserted exemption applies to each document. *See Vaughn v. Rosen*, 484 F.2d 820 (1973).

As the Third Circuit has remarked, "[t]he review of FOIA cases 'is made difficult by the fact that the party seeking disclosure does not know the contents of the information sought and is, therefore, helpless to contradict the government's description of the information or effectively assist the trial judge.'" *Davin v. U.S. Dep't of Justice*, 60 F.3d 1043, 1049 (1995) (quoting *Ferri v. Bell*, 645 F.2d 1213, 1222 (3d Cir. 1981), *modified*, 671 F.2d 769 (3d Cir. 1982)). Due to the disparity of knowledge between the withholding agency and the requesting party, courts require the agency to provide a "full and specific enough" of an explanation of the withheld documents "to afford the FOIA requester a meaningful opportunity to contest, and the district court an adequate foundation to review, the soundness of the withholding." *Davin*, 60 F.3d at 1049 (quoting *Coastal States Gas Corp. v. Dep't of Energy*, 644 F.2d 969, 974 (3d Cir. 1981)).

Accordingly, "when an agency seeks to withhold information, it must provide a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply." *Davin*, 60 F.3d at 1050 (quoting *McDonnell v. United States*, 4 F.3d 1227, 1241 (3d Cir. 1993)) (emphasis added) (internal quotation marks omitted); *King v. Dep't of Justice*, 830 F.2d 210, 223 (D.C. Cir. 1987) ("A withholding agency must describe each document or portion thereof withheld, and for each withholding it must discuss the consequences of disclosing the sought-after information."). The Third Circuit has held that the agency's description must be detailed enough "'that the requester and the trial judge [are] able to derive from the index a clear explanation of why each document or portion of a document withheld is putatively exempt from disclosure.'" *Davin*, 60 F.3d 1050 (quoting *Hinton v. Dep't of Justice*, 844 F.2d 126, 129 (3d Cir. 1988)).

EPA is thus required to provide "a particularized description of how each document withheld falls within a statutory exemption." *Davin*, 60 F.3d at 1049; *see McDonnell*, 4 F.3d at 1241; *Lame v. Dep't of Justice*, 654 F.2d 917, 928 (3d Cir. 1981). This requirement is intended "to 'transform a potentially ineffective, inquisitorial proceeding against an agency that controls information into a meaningful adversarial process.'" *Id.* The agency's description must afford the requester an opportunity "to intelligently advocate release of the withheld documents and to afford the court an opportunity to intelligently judge the contest." *Wiener*, 943 F.2d at 979.

A. EPA's *Vaughn* index and categories are not specific enough to determine whether EPA is properly withholding requested records.

The function of a *Vaughn* index and agency affidavit is "to establish detailed factual basis for application of the claimed FOIA exemptions to each of the documents withheld." *Davin*, 60 F.3d at 1049. A proper *Vaughn* index therefore must have a specific factual description of each

withheld document. The "particularized description" requirement—which is notably lacking in EPA's *Vaughn* index—is imperative to the proper functioning of FOIA. *See Wiener v. FBI*, 943 F.2d 972, 979 (9th Cir. 1991). A *Vaughn* index and affidavit are insufficient if they are "'conclusory, merely reciting statutory standards, or if they are too vague or sweeping.'" *King*, 830 F.2d at 219 (quoting *Allen v. CIA*, 636 F.2d 1287, 1291 (D.C. Cir. 1980)).

While the Third Circuit has no set formula for a *Vaughn* index, "the hallmark test is 'that the requester and the trial judge be able to derive from the index a clear explanation of why each document or portion of a document withheld is putatively exempt from disclosure.'" *Id.* at 1050 (quoting *Hinton v. Dep't of Justice*, 844 F.2d 126, 129 (3d Cir. 1988)); *see Judicial Watch, Inc. v. Food & Drug Admin.*, 449 F.3d 141, 150 (D.C. Cir. 2006). Due to "the strong policy of FOIA that the public is entitled to know what its government is doing and why," more than vague descriptions of documents are required. *Id.* at 152. A *Vaughn* index with only generalized and otherwise commonly understood words and phrases sheds little light on the documents' subject or "the deliberative nature of the information contained in the document." *Id. at* 152 (holding "fax" and "Q&A" descriptions insufficient).

Specificity at a document-by-document level is required even if the withholding agency employs a "categorical" index method, as EPA has attempted to use. As the Third Circuit explained, "It is insufficient for the agency to simply cite categorical codes, and then provide a generic explanation of what the *codes* signify." *Id.* at 1051; *see also King*, 830 F.2d at 225 ("[T]he goal of descriptive accuracy is not to be sacrificed to the niceties of a particular classification scheme."). Accordingly, "an agency using justification codes must also include specific factual information concerning the documents withheld and correlate the claimed exemptions to the withheld documents." *Davin*, 60 F.3d at 1051; *see also Wiener*, 943 F.2d at

978-79 ("boilerplate" explanation are inadequate because "[n]o effort is made to tailor the explanation to the specific documents withheld"); *King*, 830 F.2d at 234 ("Categorical description of redacted material coupled with categorical indication of anticipated consequences of disclosure is clearly inadequate."). As the Third Circuit has held, "While the use of the categorical method does not per se render a *Vaughn* index inadequate, an agency using justification codes must also include specific factual information concerning the documents withheld and correlate the claimed exemptions to the withheld documents." *Davin*, 60 F.3d at 1051.

EPA's "Coded Vaughn Index" lacks the requisite specificity. The *Vaughn* index itself provides no justification beyond a categorical labeling of which exemptions allegedly applied to each document. Rather than providing an explanation of how each document satisfies the claimed exemption, EPA provides its alleged justification in a separate declaration (the Mugdan Declaration) and an attachment to this declaration (Exhibit "X"). In these documents EPA creates 18 categories, and purports to provide a justification for each category that covers every document withheld under that exemption.

EPA provides little information that would link a document factually to the claimed exemption. Listed below are a few illustrative examples of entries from EPA's index that provide the CPG and this Court no basis on which to determine if in fact the claimed exemption would apply to the document to prevent its disclosure.[15]

- **No identifying information other than date.** Many of the documents contain neither identification of the document's author, sender or recipient, nor the subject matter of the document. Without knowing even the subject matter (let alone a particularized description) there is no way to determine the responsiveness of the

[15] EPA's index of documents is the part of EPA's Exhibit X that is in a spreadsheet format. There are no page numbers to the exhibit. The documents identified in this brief are identified by the number listed in the "Doc ID Beg" column.

document or whether it fits in the EPA-designated category or is exempted from disclosure under FOIA. For documents for which EPA claims attorney-client privilege or attorney work product, there is no way to tell whether an attorney was involved, or whether legal advice was given, because no sender or recipient is identified. A few examples include:

Doc ID Beg	Date
DASS00000133	1/11/2013
DASS00000137	1/24/2013
DASS00000317	1/4/2013
DASS00000320	1/11/2013
DASS00001754	4/8/2014
DASS00003231	3/10/2014
DASS00003289	4/8/2014
DASS00003297	4/7/2014
DASS00003437	3/28/2014
DASS00007982	12/16/2013
DASS00007983	12/16/2013
DASS00007984	12/16/2013
DASS00008084	3/24/2014
FOIA_0601800002537	8/1/2012
FOIA_06018_Outlook00000376	10/25/2013
FOIA_06018_Outlook00000377	10/25/2013
FOIA_06018_Outlook00000380	10/25/2013
FOIA_06018_Outlook00000381	10/25/2013
FOIA_06018_Outlook00000483	9/16/2013
FOIA_06018_Outlook00000484	9/16/2013

- **Generic subject matter description.** Many of the document entries contain only a generic subject matter with common words, making it impossible to tell whether the document relates to the designated category or is covered by claimed FOIA exemption. A few examples this deficiency include document entries with a subject identification merely of "Passaic," "Passaic River":

Doc ID Beg	Date
DASS00025007	3/25/2014
DASS00025008	3/25/2014
DASS00025029	3/12/2014
DASS00025037	3/12/2014
DASS00025038	3/12/2014
DASS00025039	3/12/2014
DASS00025078	2/10/2014
DASS00025112	1/13/2014
DASS00025114	1/13/2014
DASS00025162	1/14/2014
DASS00025163	1/13/2014

- **No identification of position or title of senders or recipients.** EPA does not identify what position each author and recipient holds. Identification of authors, recipients, and their positions is essential in analyzing if a particular document is deliberative. *Brinton v. Dept. of State*, 636 F.2d 600, 605 (D.C. Cir. 1980) (finding that "advisory opinions" normally flow from a subordinate to a superior where "final opinions" flow from a superior to a subordinate). Based on EPA's current *Vaughn* index and supporting declaration, neither the CPG nor this Court is able to determine if withheld documents are being sent from superiors to subordinates or another governmental employee of equal rank and authority. If these documents are authored by superiors or are being sent to other employees of equal rank, then it is likely that the policy of chilling the deliberative process between subordinates and superiors is not being advanced. Therefore, EPA's vague descriptions of documents and lack of identification of authors and recipients prevents the CPG and this Court from determining if EPA is properly withholding documents under Exemption 5.

- **No identification of attorney.** For many or most of the withheld documents, EPA has claimed a privilege of attorney-client privilege or attorney work product. Yet many of the index entries do not indicate whether an attorney was involved. EPA also has not provided a list of attorneys so that the CPG or this Court could determine if a sender or recipient is an attorney. A few examples of such documents include:

Doc ID Beg	Date
DASS00003023	4/3/2014
DASS00003202	4/7/2014
DASS00003209	3/28/2014
DASS00003723	2/8/2014
DASS00003802	3/24/2014
DASS00004174	1/6/2014
DASS00004180	1/15/2014

EPA's *Vaughn* index is therefore inadequate and provides no meaningful assistance to the CPG or this Court in evaluating whether the alleged exempted documents are being properly withheld. *See Davin,* 60 F.3d at 1051. EPA's generic description of most documents provides little to no factual link between the document and the coded category.

EPA's "Key to Coded Vaughn Index and Substantive Descriptions"("Coded Key") is also inadequate. It provides little more specifics regarding the documents than EPA has listed in the index. The descriptions of the communications and documents are written in generalities that

tell the CPG and this Court next to nothing about whether the specific documents withheld are exempt from disclosure. For example:

> These documents consist of email communications exchanged among [EPA technical staff and attorneys] concerning attached documents that were subject to review by all. These email communications and attached documents included comments and discussions of aspects of the Proposed Plan for the lower 8.3 miles of the Lower Passaic River and the Focused Feasibility Study. (Excerpt from Category 5.)

The withholding justifications in the Coded Key merely recite standards, are described with conclusory statements, and seem to be simply copied and pasted from one category to another. For example:

> The withheld documents and email communications [in Category 1] are deliberative because they contain the candid views of [EPA staff and attorneys]. . . . The documents are predecisional because they . . . [are] related to the development of the Agency's final documentation." (Ex. X, Coded Key, Category 1.)

> The documents and email communications within Category 2 are deliberative because they contain individual opinions and analyses of EPA staff . . . .which addressed the NRRB/CSTAG memo and Region 2 response. . . . The documents and email communications are all predecisional because they were part of the process leading up to finalized documents." (*Id.* at Category 2.)

These selected, illustrative statements are among many of EPA's conclusory statements claiming that nearly 2,200 communications and documents are fully exempt from disclosure. These conclusory statements demonstrate that EPA has failed to provide a particularized description of how each document falls within a claimed statutory exemption. EPA's motion for summary judgment should thus be denied.

B. EPA's statements about segregability are wholly conclusory and fail to demonstrate that the agency has released all reasonably segregable portions of each withheld document.

An agency withholding documents from a FOIA requester must release "[a]ny reasonably segregable portion of a record. . . after deletion of the portions which are exempt". 5 U.S.C. §

552(b). The law is clear: An "agency cannot justify withholding an entire document simply by showing that it contains some exempt material." *Mead Data Central v. U.S. Dep't of Air Force,* 566 F.2d 242, 260 (D.C. Cir. 1977). Instead, "the agency must demonstrate that all reasonably segregable, nonexempt information was released." *Abdelfattah v. U.S. Dep't of Homeland Sec.*, 488 F.3d 178, 186 (3d Cir. 2007); *see also Davin*, 60 F.3d at 1052 ("The statements regarding segregability are wholly conclusory, providing no information that would enable [plaintiff] to evaluate the FBI's decisions to withhold.").

In *Abdelfattah*, the agency provided no basis for which the court could make a "reasonably segregable" finding. The agency had provided "no description of the agency's process for making such a determination, no factual recitation of why certain materials are not reasonably segregable, and no indication of 'what proportion of the information in a document is non-exempt and how that material is dispersed throughout the document.'" *Abdelfattah*, 488 F.3d at 186-87 (*quoting Mead Data Central*, 566 F.2d at 261). The Third Circuit thus remanded the action to the district court for a specific segregability finding.

Here, of the 2,461 responsive documents, EPA withheld 2,191 of them in full (approximately 90%), while it has released only approximately 270 redacted documents. EPA would have this court believe factual and privileged information are so intertwined in each of these documents that there is no way to redact the privileged information. This defense seems to defy common sense, especially when one considers that environmental documents typically contain pages upon pages of factual information conveyed through charts, tables, figures and maps. As an example, one could ask whether any part of the NRRB/CSTAG memorandum or EPA Region 2's response, *both dated April 11, 2014*, had been finalized before that date. Are we simply to trust EPA that every fact, figure, table, decision—in each document—was not made

final until that date? If some aspects of those withheld records had been finalized, then they could not be pre-decisional for purposes of the deliberative-process privilege, and they should have been released, at least in redacted form.

III. Genuine Issues of Material Fact Remain Regarding the Adequacy of EPA's Search.

An agency must make a good faith effort to conduct a search for records requested under FOIA. *Oglesby v. U.S. Dep't of Army*, 920 F.2d 57, 68 (D.C. Cir. 1990). The agency has a duty to construe a FOIA request liberally. *Truitt v. Dep't of State*, 897 F.2d 540 , 544-45 (D.C. Cir. 1990).

To prevail on summary judgment, the defending agency "must show *beyond material doubt* that it has conducted a search reasonably calculated to uncover all relevant documents." *Morley v. CIA*, 508 F.3d 1108, 1114 (D.C. Cir. 2007) (emphasis added). The "agency must demonstrate that it has conducted a 'search reasonably calculated to uncover all relevant documents.'" *Steinberg v. U.S. Dep't of Justice*, 23 F.3d 548, 551 (D.C. Cir. 1994) (quoting *Weisberg v. Dep't. of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984)).

A reasonably detailed affidavit "is necessary to afford a FOIA requester an opportunity to challenge the adequacy of the search and to allow the district court to determine if the search was adequate in order to grant summary judgment." *Oglesby, v.* 920 F.2d at 68. General descriptions will not suffice; the affidavit must "describe in . . . detail what records were searched, by whom, and through what process." *Steinberg*, 23 F.3d at 552. The agency must identify "the search terms and the type of search performed" and must aver "all files likely to contain responsive materials (if such records exist) were searched." *Oglesby*, 920 F.2d at 68. Agency affidavits that lack "information specific enough to enable [the plaintiff] to challenge the procedures utilized" are insufficient to support summary judgment. *Weisberg v. U.S. Dep't of Justice*, 627 F.2d 365, 370 (D.C. Cir. 1980),

A. EPA's description of its search process is too vague and generalized to satisfy EPA's burden of justifying nondisclosure.

EPA has failed to meet its burden of showing that its search for responsive documents was reasonably calculated to uncover all relevant documents. The declaration EPA has submitted is vague and generalized as it pertains to the search process. Here are a couple of examples:

- With respect to the CPG's FOIA Request number 1, for all but three of the sub-requests, the affidavit states that Alice Yeh spoke to "several employees" of sub-contractors and asked them to "assist her in identifying documents or information . . . that might be responsive to the sub-requests for technical data and information (sub-requests #1, 2, 3, 4, 5, 6, 10, 11, 12, and 14)." Mugdan Decl. ¶ 63; EPA SOF ¶ 60. No information is provided regarding who the sub-contractors' employees were, what their role was pertaining to the Passaic River, what files were searched, whether search terms were used, or the like.

- Regarding sub-request numbers 8 and 9 of FOIA Request Number 1, the declaration says that "Alice Yeh, Sarah Flanagan and Patricia Hick determined that Region 2 employees (both current and retired) from ERRD, Office of Regional Counsel and Office of the Regional Administrator might be custodians of [responsive] emails." Mugdan Decl. ¶ 64; EPA SOF ¶ 61. The declaration goes on to indicate that the "custodians and search queries" were entered into a spreadsheet to allow a search. Again, no information is provided as to who the custodians were, why they may have responsive records, or what the search queries were. The "EERD staff person" identified as the "potential custodian" of responsive records is not identified by name, title, or role. According to the declaration, "[i]nformation responsive to [sub-request] #12 was located in EPA's files by Alice Yeh," but EPA provides no description of the search process. Moreover, the declaration provides little information regarding searches for non-email or documents kept in non-electronic format.

The declaration and *Vaughn* index also appear to indicate that EPA drew an arbitrary line at 2006 for its search for responsive documents. *See, e.g.*, Mugdan Decl. ¶ 85; EPA SOF ¶ 82. Because recently uncovered documents suggest that EPA was considering "early action" long before 2006, using 2006 as an arbitrary cut-off is inappropriate and results in EPA's searches being inadequate.

Finally, EPA's declaration relies on multiple layers of hearsay. *See, e.g.*, Mugdan Decl. ¶ 105 ("On June 10, 2014, Steve Carrea, Ms. Enck's Special Assistant, sent Alice Yeh an email

stating that Ms. Enck's materials responsive to the request described above had been uploaded to FOIAOnline."); EPA SOF ¶ 102 (same). EPA's declaration claims to be "based on [the declarant's] own personal knowledge or on information contained in the records of the [EPA] or on information supplied to me by EPA employees under my supervision and employees in other EPA offices." Mugdan Decl. at p. 1 (emphasis added). The declaration reveals, however, that Mr. Mugdan lacks personal knowledge pertaining to the key components of the search and review of the documents relevant to this FOIA litigation. Namely, the declaration reveals that he was not involved in identifying potentially responsive custodians or documents, reviewing documents, or deciding which documents to release or withhold.

EPA's declaration states that each FOIA request was assigned to Ms. Yeh, who worked with Sarah Flanagan and Patricia Hick "to plan and manage the search, collection and review of responsive information." *See* Mugdan Decl. ¶¶ 57, 60. Thereafter, those three individuals and various unidentified "Region 2 staff"—and notably, *not* Mr. Mugdan—engaged in:

- Corresponding with the CPG regarding EPA's review status (*id.* at ¶¶ 58, 60, 62, 68, 79, 81-83, 99-101, 114-117);
- Interpreting the FOIA requests (*id.* at ¶¶ 61, 80, 98);
- Identifying relevant individuals and EPA staff email accounts where potentially responsive documents may be located (*id.* at ¶¶ 61, 64, 66, 80, 85, 98, 103);
- Developing instructions for conducting the search, including which collection software to use, as well as which search terms and defined search parameters to employ (*id.* at ¶¶ 61, 64, 66, 80, 84, 85, 98, 102-103);
- Discussing and categorizing which documents were not responsive, which could be released in full or in part, and which needed to withheld (*id.* at ¶¶ 61, 70, 80 87-89, 98, 110-111); and
- Producing and uploading documents (*id.* at ¶¶ 73-75, 91-93, 113, 118, 129).

Not only was Mr. Mugdan not an identified part of this process, but his declaration also recounts conversations that he was not a party to. For example, the declaration recounts that, to identify responsive documents, Ms. Yeh had conversations with the Louis Berger Group and Battelle (*id.* at ¶ 63), Regional Administrator Judith Enck (*id.* at ¶¶ 104-106), the Public Affairs Division (*id.* at ¶ 107), Clean Water Division staff (*id.* at ¶¶ 122-126), and the ERRD (*id.* at ¶¶ 122, 127). Indeed, if one excised the portions of Mr. Mugdan's declaration based on hearsay, no information would be left to substantiate EPA's document collection and review process.

EPA cannot satisfy its burden of proof based solely on a declarant who lacks personal knowledge on nearly every facet of the document search, collection, review, and production process, particularly when serious questions exist about each of these steps. EPA's declaration is therefore insufficient evidence on which to grant summary judgment, and instead demonstrates why discovery is necessary in this case.

B. EPA's inadequate search of personal e-mail accounts in which official business was conducted warrants denial of the summary judgment motion and discovery.

Work-related e-mails are subject to FOIA as "agency records" even when they are in personal e-mail accounts rather than official e-mail accounts. *See Judicial Watch, Inc. v. Dep't. of State*, No. 14-1242 (RCL), at *1 (Mar. 29, 2016); *Landmark Legal Foundation v. E.P.A.*, 959 F. Supp. 2d 175, 181-82 (D.D.C. 2013). Discovery is appropriate in a FOIA case when an agency did not search personal e-mail accounts in which official government business was being conducted. *See id.*

In *Landmark Legal*, the court denied summary judgment and ordered discovery because personal e-mail accounts of EPA officials had not been searched. 959 F. Supp. 2d at 184 ("The possibility that unsearched personal email accounts may have been used for official business raises the possibility that leaders in the EPA may have purposefully attempted to skirt disclosure

under the FOIA."). Other courts also have ordered discovery when a personal e-mail account used for official business was not searched by an agency to respond to a FOIA request. *See, e.g.*, *Judicial Watch, Inc. v. Dep't. of State*, No. 13-1363 (EGS) (D.D.C. May 4, 2016); *Judicial Watch, Inc. v. Dep't. of State*, No. 14-1242 (RCL), at *2-3 (Mar. 29, 2016).

The CPG specifically requested work-related e-mails sent on personal e-mail accounts by EPA personnel or Region 2 Administrator Judith Enck to members of the public:

> Any and all communications regarding the LPRSA between: 1. Any U.S. EPA personnel and any member of the Community Advisory Group or any other person purporting to be a representative of the community; and 2. Any member of the public and Judith Enck, including any alter egos or aliases of Administrator Enck. This information would include but not be limited to all letters, email (both official accounts and personal accounts used for official business), and any notes, records, reports, summaries or memoranda taken during or prepared after communications with members of the public relating to the LPRSA.

Request EPA-R2-2014-006476, May 14, 2014, Request #4.

Furthermore, every CPG request included any work-related e-mails sent on personal e-mail accounts because such e-mails are "agency records." *See Landmark Legal Foundation*, 959 F. Supp. 2d at 181-82.

1. EPA's declaration is not based on personal knowledge, does not address fundamental search parameters relating to Ms. Enck's e-mails, and is contradicted by other disclosed records.

Based on the declaration provided by EPA, the agency failed to properly search the Region 2 administrator's private email account. Mr. Mugdan describes events to which he does not have personal knowledge. Mugdan Decl. ¶¶ 104-106; EPA SOF ¶¶ 101-103. According to the declaration, Alice Yeh e-mailed Ms. Enck to inform her that Region 2 would use EPA's eDiscovery software to search Ms. Enck's work e-mail account, and that she would need to search her personal e-mails and other documents for other responsive information. *Id.* at ¶ 104; EPA SOF ¶ 101. In a response three weeks later, Ms. Enck's special assistant reported that Ms.

Enck's materials responsive "to the request described above" had been uploaded to FOIA online. *Id.* at ¶ 105; EPA SOF ¶ 102. Mr. Mugdan's declaration concludes this topic by stating:

> As of May 2016, Ms. Enck has confirmed that her search included all locations reasonably likely to contain responsive information to CPG's Third Request. Ms. Enck has confirmed that she did not use her personal email account for communications regarding the Lower Passaic River Study Area with any members of the public. . . .

Id. at ¶ 106; EPA SOF ¶ 103.

It is not clear from Mr. Mugdan's declaration who searched Ms. Enck's e-mails or how the search was conducted. It is not clear why Ms. Enck apparently was allowed to forego use of EPA's eDiscovery software. The declaration reports that Ms. Enck searched for responsive information to CPG's Third Request, but does not state whether Ms. Enck searched for information responsive to the other FOIA requests. And while Mr. Mugdan's declaration reports that Ms. Enck "did not use her personal e-mail account for communications regarding the Lower Passaic River Study Area with members of the public," it does not state whether Ms. Enck sent *any* work-related e-mails from her personal e-mail account that might be responsive to the CPG's other requests.

The declaration by Mr. Mugdan is not sufficient to certify Ms. Enck's actions. Only Ms. Enck can certify her actions to respond to the CPG's requests. And information from Ms. Enck is necessary to answer the many questions surrounding her search, collection, and production of potentially responsive information from her files.

This is especially true since the confirmation reported by Mr. Mugdan is inaccurate. Even though Ms. Enck confirmed she "did not use her personal e-mail account for communications regarding the Lower Passaic River Study Area with members of the public," documents produced by EPA in response to other FOIA requests tell a different story. On June 12, 2011, Ms. Enck sent an e-mail from her personal e-mail account to Miriam Gordon, the California state

director of Clean Water Action. In response to Ms. Gordon's inquiry about "stronger methods for waterway cleanup than TMDLs," Ms. Enck discussed the use of Superfund for the Passaic River: "140 miles of the Hudson river was declared a federal superfund site – and it's an estury [*sic*]. **same thing with the passaic river.** it is slow slow slow, but a much more effective strategy than tmdl's." Hyatt Aff., Exhibit J, p. 5 (emphasis added). Ms. Enck forwarded the e-mail to herself on December 19, 2013. Even though this was a communication regarding the Lower Passaic River Study Area with a member of the public, Ms. Enck claimed she had *no such e-mails* and none were produced or listed as exempt by EPA in response to the CPG's FOIA requests.

Ms. Enck also described communications with members of the public about the Passaic River in a June 16, 2010 e-mail to the declarant, Walter Mugdan: "can we talk in detail about sediment washing? **Some of the nj groups have raised this with me regarding the passaic** and the desire to clean up the seident [*sic*] and use it as a bud locally." *Id.* at p. 3 (emphasis added). Ms. Enck's e-mail to Mr. Mugdan was in response to an e-mail she received from a member of the public about a New York site.

These e-mails demonstrate that Ms. Enck used her personal e-mail account to discuss the Passaic River, including with members of the public. EPA did not produce or list on the *Vaughn* index any e-mails from Ms. Enck's personal e-mail account. Instead, Ms. Enck confirmed that no responsive e-mails existed, when clearly they do.

EPA's motion for summary judgment should be denied because Mr. Mugdan's declaration is inaccurate and EPA's search was inadequate. *See Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321, 327 (D.C. Cir. 1999) (reversing summary judgment because of the agency's inadequate search) ("[W]hat causes us to conclude that the search was inadequate arises

from the fact that the record itself reveals 'positive indications of overlooked materials.'"). In addition, discovery regarding Ms. Enck's collection efforts should be allowed.

2. EPA's declaration does not address personal e-mail accounts by any EPA official other than Ms. Enck.

In *Landmark Legal*, the court denied EPA's motion for summary judgment and ordered discovery based on a single e-mail that indicated EPA officials used personal e-mail accounts for official business. 959 F. Supp. 2d at 181-82. According to the court:

> [EPA's] failure to deny the allegations that personal accounts were being used to conduct official business leaves open the possibility that they were. Because any search in response to Landmark's request that left out these possibly key sources would not be 'reasonably calculated to uncover all relevant documents,' the Court finds that there is an outstanding issue of material fact precluding summary judgment as to the adequacy of the EPA's search.

Id. at 182.

Mr. Mugdan's declaration does not identify searches of any personal e-mail accounts other than Ms. Enck's. This is despite the CPG's express request for certain documents in personal e-mail accounts by any EPA personnel. (Request EPA-R2-2014-006476, May 14, 2014, Request #4.) In addition, *all* of the CPG's requests included work-related e-mails sent from personal e-mail accounts because those are "agency records." *See Judicial Watch, Inc. v. Dept. of State*, No. 14-1242 (RCL), at *1 (Mar. 29, 2016); *Landmark Legal Foundation v. E.P.A.*, 959 F. Supp. 2d 175, 181-82 (D.D.C. 2013).

EPA's *Vaughn* index demonstrates that multiple EPA officials—including the declarant, Mr. Mugdan—used personal e-mail addresses for official business. For example:

- Mr. Mugdan sent an e-mail from his personal AOL account to an EPA official regarding the Passaic. DASS00007971 (Jan. 3, 2014).
- The site project manager, Eugenia Naranjo, used her personal Hotmail account for EMBM comments. FOIA_0601800007232 (Aug. 8, 2007).

- Another EPA employee, who later worked for the Army Corps, used a personal Yahoo address. FOIA_0601800007925 (Jan. 16, 2008); FOIA_0601800007926 (Jan. 17, 2008).

Because personal e-mail accounts were used for official business, EPA should have searched these accounts for responsive records. EPA does not identify or describe any such search.

EPA's search for responsive records was inadequate. *See Valencia-Lucena*, 180 F.3d at 327 ("It is well-settled that if an agency has reason to know that certain places may contain responsive documents, it is obligated under FOIA to search barring an undue burden."). The above-described deficiencies in the search process are but a few examples. Similar deficiencies can be found throughout EPA's descriptions of the agency's search. EPA has failed to meet its burden to show that it conducted a search reasonably calculated to uncover all relevant documents. The motion for summary judgment should be denied. In addition, discovery regarding EPA's collection efforts from personal e-mail accounts should be allowed.

IV. Genuine Issues of Material Fact Remain Regarding the Documents and Communications EPA Has Withheld under FOIA Exemption 5.

FOIA's "Exemption 5" allows the federal government to withhold "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). The provision has been construed to protect "documents that are normally privileged in the civil discovery context." *NLRB. v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975). The agency cannot use a privilege to hide behind a veil of secrecy. *Coastal State Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 867 (D.C. Cir. 1980).

A. EPA has improperly withheld requested records under the deliberative process privilege.

If an agency claims the "deliberative process privilege" under Exemption 5, the agency must show that the information in question is both pre-decisional and deliberative. *Id.* at 866.

To be pre-decisional, the communication must be "generated before the adoption of an agency policy." *Judicial Watch, Inc. v. Food & Drug Admin.* 449 F.3d 141, 151 (D.C. Cir. 2006). A "document that is predecisional at the time of preparation," however, "may lose exempt status if 'adopted, formally or informally, as the agency position on an issue or is used by the agency in its dealings with the public.'" *Taxation With Representation Fund v. IRS*, 646 F.2d 666, 678 (D.C. Cir. 1981) (quoting *Coastal States Gas Corp.*, 617 F.2d at 866).

To qualify as deliberative, the communication must reflect advisory opinions, recommendations, and deliberations comprising part of a process by which the government decision or policy was formulated, or the personal opinions of the writer prior to the agency's adoption of the policy. *Pub. Citizen, Inc. v. Office of Mgmt. and Budget*, 598 F.3d 865, 875 (D.C. Cir. 2010); *Klamath Water Users Protective Ass'n*, 532 U.S. at 8. Factual information generally is not covered by the deliberative process privilege, as its release would not expose the agency's deliberations. *See EPA v. Mink*, 410 U.S. 73, 91 (1973).

An agency fails to justify a FOIA exception when it offers only conclusory statements to the effect that information is exempted simply because it was discussed internally. *Chesapeake Bay v. U.S. Army Corps of Eng'rs*, 677 F. Supp. 2d 101, 107 (D.D.C. 2009). This is true because "[t]he deliberative process privilege does not generally shield purely factual information from disclosure." *Id.* at 108. By offering nothing "beyond the most conclusory statements," an agency fails to carry its burden that Exemption 5 applies. *Id.*

Here, EPA has done exactly what the U.S. Army Corps of Engineers attempted in *Chesapeake Bay*, by withholding factual information and offering only conclusory statements to support its withholding. EPA attempts to cloak its conclusory statements by the use of categories. Although the CPG agreed in concept that categories could be used to aid EPA in describing why documents were being withheld, EPA has not used its proposed categories in such a way here. Instead, EPA lists categories in the *Vaughn* index and then, as shown above (on pages 13-14), uses conclusory statements in the Coded Key that do not help this Court or the CPG in determining why the documents are deliberative and pre-decisional.

Exemption 5 also does not apply if a document is adopted, formally or informally, into the final decision. *Nat'l Council of La Raza v. Dep't of Justice*, 411 F.3d 350, 357-60 (2d Cir. 2005). As the U.S. Supreme Court reasoned:

> The probability that an agency employee will be inhibited from freely advising a decisionmaker for fear that his advice *if adopted*, will become public is slight. First, when adopted, the reasoning becomes that of the agency and becomes its responsibility to defend. Second, agency employees will generally be encouraged rather than discouraged by public knowledge that their policy suggestions have been adopted by the agency. Moreover, the public interest in knowing the reasons for a policy actually adopted by an agency supports [disclosure].

Id. at 357 (quoting *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 161 (1975)); *see also Shemco Indus. v. Sec'y of the Air Force*, 613 F.2d 1314, 1319 (5th Cir. 1980) (finding that communication is no longer exempt once the agency adopts the employee's advice as its own).

EPA cannot claim protection under the deliberative process privilege for post-decisional documents. The agency has not sufficiently demonstrated that the withheld documents were pre-decisional. Many of the documents on the *Vaughn* index designated as deliberative process have no date. (*E.g.*, FOIA_05768_000090, FOIA_05768_000090). Furthermore, even for dated documents, the date alone is not determinative. A document that is predecisional at the time of preparation could lose its exempt status if it becomes the final agency position on the issue.

Taxation with Representation Fund, 646 F.2d at 678 (quoting *Coastal States Gas Corp.*, 617 F.2d at 866).

EPA asserts that records withheld under the deliberative process privilege are pre-decisional as they relate to four "final documents": (1) Conceptual Site Model ("CSM"); (2) Empirical Mass Balance Model ("EMBM"); (3) Lower 8.3 Miles RI/FFS; and (4) Proposed Plan. The CSM and EMBM were released in June 2008.[16] The RI/FFS and Proposed Plan were released on April 11, 2014. Further, the RI/FFS and Proposed Plan were then incorporated to a final ROD released in March 2016.

Documents created and communications exchanged after these decision dates are post-decisional and cannot be withheld under the deliberative process privilege. Thus, the following documents are illustrative of post-decisional documents related to the CSM or EMBM that improperly have been withheld:

Doc ID Beg	Date	Subject
FOIA_0601800002006	11/5/2009	Fw: CSM Summit Preparation
FOIA_0601800002018	11/17/2009	Re: Action Items from CSM Summit
FOIA_0601800002020	11/17/2009	Re: Action Items from CSM Summit
FOIA_0601800002021	11/17/2009	Re: Action Items from CSM Summit
FOIA_0601800002025	11/18/2009	Re: Action Items from CSM Summit
FOIA_0601800002128	11/18/2009	CSM Summit Action Items
FOIA_0601800002036	4/25/2012	Appendix C - EMBM
FOIA_0601800002365	4/29/2011	Comparing of CSM Trajectories and Model Forecasts
FOIA_0601800002367	4/29/2011	RE: Comparing of CSM Trajectories and Model Forecasts
FOIA_0601800002470	11/3/2009	CSM Summit Summary info

[16] *See* https://cfpub.epa.gov/si/si_public_record_Report.cfm?dirEntryID=74699 (last visited June 2, 2016) (stating that the "CSM-EMB was submitted for external peer review in June 2008). CSMs were also completed in August 2005 and February 2007. *See* http://ourpassaic.org/ConceptualSiteModel.aspx (last visited on June 2, 2016).

FOIA_0601800002677	8/26/2008	Re: Fw: comments on the CSM peer review document
FOIA_0601800002722	8/12/2008	are you reviewing the Passaic CSM peer review document?
FOIA_0601800002723	8/12/2008	Re: are you reviewing the Passaic CSM peer review document?
FOIA_0601800003053	2/16/2011	Draft CSM
FOIA_0601800003054	2/16/2011	Draft CSM
FOIA_0601800003301	7/9/2008	RE: Passaic River CSM Peer Review Consensus Teleconference - Files for Clarifying Question for Bopp
FOIA_0601800003627	6/17/2010	Draft CSM presentation
FOIA_0601800008203	6/16/2010	EMBM Abstract
FOIA_0601800008204	6/16/2010	CSM abstract
FOIA_0601800008206	6/16/2010	CSM abstract
FOIA_0601800008217	6/28/2010	EMBM Abstract
FOIA_0601800008965	8/12/2008	Comments on CSM-EMBM peer review
FOIA_0601800008969	8/20/2008	Re: Passaic - History of EMB - SAVE; TO 0002/WVN4
Tst_0601800000479	12/13/2012	Updated EMBM Trajectories
Tst_0601800000480	12/13/2012	Draft EMBM Results table
Tst_0601800001781	4/26/2012	RE: Appendix C - EMBM

Accordingly, EPA should immediately release any documents and communications related to the CSM or EMBM that were created or exchanged after June 2008. Such documents cannot be deliberations comprising part of a process by which the government decision or policy was formulated in June 2008.

As pertaining to the RI/FFS and Proposed Plan, EPA emphasizes the date of April 11, 2014, when the documents were released. But that date doesn't necessarily mean that no decisions were final until that point. It is likely that EPA's decisions, or parts therein, were final before EPA released its decision to the public on April 11. EPA's *Vaughn* index and declaration

are not specific enough to be able to determine at what point various decisions or data became final for purposes of the deliberative process privilege.

Many of the requested documents likely have been confirmed and incorporated into the final documents. They are no longer protected and should be produced. *See NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 161 (1975). The descriptions provided by EPA in no way reject that these documents were confirmed and incorporated into FFS, Proposed Plan, or the Rule of Decision. In fact, EPA asserts that certain documents, including the recommendations and comments of the CSTAG and the NRRB, "were incorporated into the eventual selected remedy and Record of Decision." (EPA's SOF ¶ 40) Under applicable FOIA case law, these materials are not exempt from disclosure and should have been released.

As seen in these examples, EPA has failed to demonstrate that the withheld records are protected by the Exemption 5 deliberative process privilege. Genuine issues of material fact exist regarding whether Exemption 5 applies to these non-deliberative documents, and summary judgment should not be granted as a matter of law.

1. Purely factual information or factual information within a deliberative memorandum is not exempt under FOIA Exemption 5.

Purely factual information or factual portions of a deliberative memorandum are not protected by Exemption 5. *See generally EPA v. Mink*, 410 U.S. 73, 91 (1973). EPA appears to have withheld documents that contain only factual information related to the Passaic River.

The *Vaughn* index contains descriptions for the following documents, among others, which on their face suggest that EPA has improperly withheld factual, technical, or purely data material:

Doc ID Beg	Date	Subject
DASS00006174	1/8/2014	2-page fact sheet for administrator briefing

DASS00006691	1/7/2014	attachment – Sediment Texture Maps
DASS00006693	1/7/2014	attachment – FFS Tables and Figures
DASS00006695	1/7/2014	attachment – FFS Tables and Figures
Tst_0601800001475	7/26/2011	Attachment: "factsheet1.pdf"
Tst_0601800004534	9/27/2013	Summary of 2012 and 2013 Sediment PRGs and Model Outputs
Tst_0601800004540	9/25/2013	Summary of 2012 and 2013 Sediment PRGs and Model Outputs
Tst_0601800004694	8/9/2013	BSAF Regression - Delivery
Tst_0601800004695	8/9/2013	BSAF Regression - Delivery
Tst_0601800004698	8/9/2013	BSAF Regression - Delivery
Tst_0601800004699	8/9/2013	BSAF Regression – Delivery (UNCLASSIFIED)
Tst_0601800004700	8/9/2013	BSAF Regression – Delivery (UNCLASSIFIED)
Tst_0601800004701	8/9/2013	BSAF Regression - Delivery
Tst_0601800004702	8/9/2013	BSAF Regression - Delivery
FOIA_0601800002115	10/2/2008	Re: Fact Sheet: Passaic
FOIA_0601800002116	10/2/2008	Hot Issue Fact Sheet
FOIA_0601800002180	10/2/2008	Fw: Fact Sheet: Passaic
FOIA_0601800002181	10/2/2008	Re: Fact Sheet: Passaic
FOIA_0601800003308	11/4/2008	Draft Figure
FOIA_0601800003311	8/28/2006	Draft Table
FOIA_0601800003935	3/2/2012	FFS fact sheet
FOIA_0601800004055	5/30/2007	Draft FFS fact sheet
FOIA_0601800004734	9/9/2008	Early Action Fact Sheet
FOIA_0601800004736	9/11/2008	Early Action Fact Sheet
FOIA_05768_000090		2012-01-25 Fish-Crab Ingestion Tech
FOIA_05768_000090		Burger raw data & calculations – for

Further, factual investigative material information is not protected by Exemption 5 unless it is inextricably intertwined with pre-decisional, deliberative information that is protected. *Gold Anti-Trust Action Comm., Inc. v. Bd. of Governors of the Fed. Reserve Sys.*, No. 09-2336, 2011

WL 332541, at *7 (D.C. Cir. Feb. 3, 2011); *Morley v. CIA*, 508 F.3d 1108, 1128 (D.C. Cir. 2007). EPA has the burden "to show that the exempt portions of the documents are not segregable from the non-exempt material." *Missouri Coalition for the Env't v. U.S. Army Corps of Eng'rs*, 542 F.3d 1204, 1212 (8th Cir. 2008). "[EPA's] justification must be relatively detailed, correlating specific parts of the requested documents with the basis for the applicable exemption." *Id.*

EPA incorrectly argues (at 26) that the deliberative process privilege coupled with the work product doctrine permits the EPA to throw a blanket over *all factual material*. The attorney work product is not that broad. Instead, to be protected from disclosure, the material must be created in anticipation of litigation and, if disclosed, would reveal the attorney's thought processes and strategic thinking, as discussed further below. Many of the documents listed are pure factual or technical documents that would not reveal an attorney's strategies (even if it could be claimed that the material was prepared in anticipation of litigation).

B. EPA is improperly withholding requested records under the attorney-client privilege and work-product doctrine.

For the attorney-client privilege to apply, the withheld records must contain "confidential communications" between attorneys and their clients "relating to a legal matter for which the client has sought professional advice." *Mead Data Central, Inc., v. U.S. Dep't of Air Force*, 566 F.2d 242, 252 (D.C. Cir. 1977). Moreover, facts supplied by other persons or sources (such as facts found in technical environmental data) are not protected from disclosure under the attorney-client privilege unless the facts reflect client confidences. *Brinton v. Dep't of State*, 636 F.2d 600, 603 (D.C. Cir. 1980).

EPA's justification for **cloaking 657 documents under the attorney-client privilege** is wholly inadequate. (Mugdan Dec. ¶ 142.) As shown in examples above, one cannot tell from the

Vaughn index whether an attorney was involved in the communications withheld as attorney-client privileged. In most instances, the subject matter identified is so general that it is impossible to tell whether the communication sought or provided legal advice. EPA says that its attorneys provide legal advice to EPA staff "concerning the interpretation of CERCLA and its implementing regulations and guidance." (Mugdan ¶ 142.) But memoranda from governmental agency attorneys are not protected under the attorney-client privilege if they contain "neutral, objective analyses" of the environmental regulations, because "Exemption 5 and the attorney-client privilege may not be used to protect . . . agency law from disclosure to the public." *Tax Analysts v. IRS*, 117 F.3d 607 619 (D.C. Cir. 1997) (citing *Coastal States Gas Corp.*, 617 F.2d at 863).

EPA makes conclusory statements that the documents withheld under the attorney-client privilege contained confidential communications, but nothing in the *Vaughn* index demonstrates the alleged confidential nature or whether the documents were ever shared with third parties. It is the government's burden to prove that the claimed privilege applies, and this court should not simply assume the elements have been met simply because EPA says so. *See Mead Data*, 566 F.2d at 254.

Next, according to EPA's declaration, the agency **withheld in full or in part approximately 599 documents as attorney work product**. (Mugdan Decl. ¶ 143.) The work-product doctrine applies only to materials "prepared in anticipation of litigation and not in the ordinary course of business, or pursuant to public requirements unrelated to litigation." *Manna v. U.S. Dep't of Justice*, 815 F. Supp. 798, 814 (D.N.J. 1993) (quoting *United States v. Rockwell Int'l*, 897 F.2d 1255, 1265 (3d Cir. 1990)) (internal quotation marks omitted). The work-product

privilege ordinarily does not attach until at least "some articulable claim, likely to lead to litigation," has arisen. *Coastal States Gas Corp.*, 617 F.2d at 865.

The Third Circuit requires the government to demonstrate a close nexus between the creation of the allegedly protected document and the prospect of litigation. As articulated in *Rockwell*, the doctrine can be invoked only if, "in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of future litigation." 897 F.2d at 1266 (emphasis added) (quoting *In re Grand Jury Proceedings*, 604 F.2d 798, 803 (3d Cir. 1979)); *see also id.* at 1265 (discussing that "primary motivating purpose" of document should be to aid in possible litigation).

"[T]he mere possibility of future litigation is insufficient to meet the 'in anticipation of litigation' standard.'" *Maertin v. Armstrong World Indus., Inc.*, 172 F.R.D. 143, 148 (D.N.J. 1997). Instead, the party invoking the work-product doctrine must identify a "'specific claim or impending litigation when the materials are prepared.'" *Id.* (quoting *Leonen v. Johns-Manville*, 135 F.R.D. 94, 97 (D.N.J. 1990)).

Here, EPA fails to demonstrate that the withheld documents were prepared because of the prospect of litigation or that an articulable or specific claim was contemplated when the materials were drafted. The factual, data, and technical materials were created to identify the remedial needs and measures for an appropriate cleanup of the Passaic River, not for litigation. EPA cites no actual litigation that was the focus of the withheld documents. (Mugdan Dec. ¶ 143.) As courts have observed, "'the policies of the FOIA would be largely defeated,'" if agencies "were allowed 'to withhold any document prepared by any person in the Government with a law degree simply because litigation *might someday occur*.'" *Senate of the Com. of Puerto Rico v. U.S.*

Dep't of Justice, 823 F.2d 574, 587 (D.C. Cir. 1987) (quoting *Coastal States Gas Corp.*, 716 F.2d at 865) (emphasis added).

Because EPA has "failed to supply . . . even the minimal information necessary to make a determination" whether the documents were created because of litigation, the motion for summary judgment fails as a matter of law as it pertains to documents EPA claims to be attorney work product. *Id.* For similar reasons, EPA's motion also fails as a matter of law as it pertains to the claim of attorney-client privilege.

V. Genuine Issues of Material Fact Remain Regarding the Documents and Communications EPA Has Withheld under FOIA Exemption 6 Because the Withholdings Are Not Sufficiently Justified.

FOIA Exemption 6 protects from disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § (b)(6). In determining whether disclosure is warranted, courts analyze "whether the information sought is subject to privacy protection and, if so, whether the invasion of privacy is 'clearly unwarranted.' This inquiry involves a balancing of the public interest served by disclosure against the harm resulting from the invasion of privacy.'" *McDonnell v. United States*, 4 F.3d 1227, 1251-52 (3d Cir. 1993) (quoting *I.B.E.W. Local Union No. 5 v. U.S. Dep't of Hous. & Urban Dev.*, 852 F.2d 87, 89 (3d Cir. 1988), holding modified by *Sheet Metal Workers Int'l Ass'n, Local Union No. 19 v. U.S. Dep't of Veterans Affairs*, 135 F.3d 891 (3d Cir. 1998)).

The Court "must keep in mind that there is a presumption in favor of disclosure" and that "Congress' dominant objective under FOIA to provide full disclosure." *McDonnell*, 4 F.3d at 1252 (emphasis added); *Citizens for Env. Quality v. U.S. Dep't of Agric.*, 602 F. Supp. 534, 538, 540 (D.D.C. 1984) (denying agency's summary judgment motion "in light of the heavy burden on the government under Exemption 6, and the government's failure to submit facts creating

more than a mere possibility of identification or to controvert the plaintiff's assertion of the public's interest in the documents sought").

Here, EPA has failed to meet its burden of showing that the release of the withheld documents that allegedly contain personnel or medical information would constitute a clearly unwarranted invasion of personal privacy. As shown above, EPA has not described the documents with sufficiently particularized detail. Thus, EPA has established "no more than a 'mere possibility'" that exempted information might be disclosed, which "is not enough." *Finkel v. U.S. Dep't of Labor*, 2007 WL 1963163, *9 (D.N.J. June 29, 2007) (quoting *Arieff v. U.S. Dep't of Navy*, 712 F.2d 1462, 1467 (D.C. Cir. 1983)).

On the other hand, the CPG and the public have an interest in understanding what information EPA considered in arriving at its decisions and to be able to fully understand the basis for the Proposed Plan (EPA estimates the cost of the remedy to be $1.38 billion[17]) and the FFS. Further, even if EPA is shielding certain personnel information of document custodians, the CPG must be able to determine whether EPA conducted an adequate search for records responsive to the CPG's FOIA requests.

The identified subject matter of many of the documents on the *Vaughn* index for which EPA has claimed Exemption 6 are simply too general to be able to provide the CPG and the Court with any meaningful information to conduct the requisite balancing of the public interest served by disclosure against the harm resulting from the alleged invasion of privacy. For example, several documents are labeled simply with a subject of "top secret info." (EPA Ex. X, FOIA_0601800008322, 8323, 9140, 9141.) Another document has a subject of "RE: FW: Final FFS Table of Contents" (FOIA_0601800002370) and another is titled "RE: FW: CSTAG

[17] *See* http://www.ourpassaic.org/ (last visited June 1, 2016).

briefing" (FOIA_0601800007689). Such descriptions provide no basis on which to consider whether personnel or medical information may be included in the fully withheld document.

These are illustrative examples of documents throughout EPA's *Vaughn* index. In some cases the Coded Key sheds some light on the Exemption 6 claim, but in others, there is *no justification* given for the claimed exemption. *Compare* Category 5 (describing "personal information such as discussions of child-care, vacation, and other use of personal time or leave) *with* Category 4 (providing no justification for Exemption 6, despite identifying 3 documents to which the exemption allegedly applies). EPA thus has failed to meet its burden of demonstrating that Exemption 6 applies.

VI. Genuine Issues of Material Fact Remain Regarding Whether EPA Improperly Withheld Documents under FOIA Exemption 7(A), and EPA Has Not Justified Withholding Documents under This Exemption.

EPA improperly claims that certain withheld documents are exempt under Exemption 7(A), located at 5 U.S.C. § 553(b)(7)(A). (*See* EPA's MSJ, pp. 32-38; Mugdan Decl. ¶¶ 139-140; *Vaughn* index Categories 8, 9, 10, 12, 15, and 18). This exemption applies to "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information could reasonably be expected to interfere with enforcement proceedings."

Exemption 7 contains an initial threshold requirement that the records withheld must have been "compiled" for law enforcement purposes. Thereafter, even if the documents were "compiled" for law enforcement purposes, "[t]o fit within Exemption 7(A), the government must show that (1) a law enforcement proceeding is pending or prospective and (2) release of the information could reasonably be expected to cause some articulable harm." *Manna v. U.S. Dep't of Justice*, 51 F.3d 1158, 1164 (3d Cir. 1995) (citing *FBI v. Abramson*, 456 U.S. 615, 630 (1982); *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 224 (1978))

EPA fails to satisfy its burden to demonstrate that any of these requirements have been met. *First*, the withheld documents were not "compiled" for law enforcement purposes. In particular, the documents were neither created nor subsequently gathered for law enforcement purposes. *Second*, there was no pending or prospective law enforcement proceeding at the time these materials were created and compiled. *Third*, EPA has failed to provide information sufficient to determine what (if any) harm would reasonably follow from releasing the requested documents. EPA failed to provide the required factual basis demonstrating why each document individually satisfied the claimed exemption. Rather, EPA provided a single conclusory paragraph (repeated nearly verbatim in its "Justifications for Withholding" portion of its *Vaughn* index, Mr. Mugdan's Declaration, and the argument portion of its brief in support of summary judgment) that purports to cover all 56 documents withheld under Exemption 7(A). Not only is this approach unacceptable under FOIA, the purported justification provided is insufficient to justify withholding the documents under the law enforcement exemption. Moreover, EPA improperly attempted to bolster its unsupported justification by claiming a heightened need to withhold the information based on who the requestors were, a consideration inappropriate under FOIA.

A. The documents requested were not compiled for law enforcement purposes

The documents requested have never been compiled for law enforcement purposes and, therefore, EPA inappropriately invoked Exemption 7(A). This threshold requirement requires EPA demonstrate that it gathered the requested documents at some point for a law enforcement purpose. *See John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 155 (1989). When making this determination, the primary function of the agency withholding the documents is a key consideration. Appropriately, "courts apply a more deferential standard to a claim that information was compiled for law enforcement purposes when the claim is made by an agency

whose primary function involves law enforcement." *Tax Analysts v. IRS*, 294 F.3d 71, 77 (D.C. Cir. 2002). In contrast, however, "an agency whose principal function is not law enforcement bears the burden of proving that the records it seeks to shelter under Exemption 7 were compiled for adjudicatory or enforcement purposes." *Davin v. United States Dep't of Justice*, 60 F.3d 1043, 1054 n.3 (3d Cir. 1995) (quoting *Stern v. FBI*, 737 F.2d 84, 88 (D.C. Cir. 1984)) (internal quotation marks omitted).

Further, the timing of when the documents were compiled must be considered. *See Tax Analysts*, 294 F.3d at 78 ("In assessing whether records are compiled for law enforcement purposes . . . the focus is on how and under what circumstances the requested files were compiled . . .") (quoting *Jefferson v. Dep't of Justice, Office of Prof'l Responsibility*, 284 F.3d 172, 176 (D.C. Cir. 2002)). In particular, courts should be cautious to ensure that the withholding agency does not make a "compilation" after a FOIA request is submitted solely to frustrate that request. *See John Doe Agency*, 493 U.S. at 155 n.6 (suggesting that "the chronology of [a] case [can] raise[] a question about the bona fides of the Government's claim that any compilation was not made solely in order to defeat the FOIA request"). Because of this fear, logically, the required "compiling" should occur prior to the time a FOIA request is made.

EPA provides a single conclusory sentence concerning when the requested documents were compiled, claiming: "Here, the records withheld by the EPA were compiled pursuant to the EPA's statutory authority under CERCLA, as part of the agency's efforts to enforce that statute with respect to the 17 Miles and the Lower 8.3 Miles." (Mugdan Decl. ¶ 144; EPA's MSJ, p. 33).

EPA's primary function is to implement congressionally enacted environmental laws by writing regulations and national standards. Because EPA's primary function does not involve

law enforcement,[18] no deference should be afforded to EPA's self-serving determination that the documents requested related to a law enforcement purpose. As such, EPA is required to demonstrate that the documents were in fact compiled for a law enforcement purpose.

EPA's single sentence on this issue fails to satisfy this burden. Specifically, it fails to provide any details regarding when or for what specific purpose these documents were allegedly "compiled." EPA includes no information to determine when EPA allegedly "compiled" the documents. The available, limited information reveals that the withheld documents were not originally created for a law enforcement purpose. Nearly all of these documents are technical in nature, and not related to any specific PRPs. For example, EPA is withholding documents concerning a Newark Bay Ecological Risk Assessment, an Empirical Mass Balance Model, biota analysis, a Conceptual Site Model, and various data evaluation reports, including a discussion of whether the Passaic should be classified as freshwater or saline, and the mercury content in fish tissue.[19]

Because the withheld documents were not originally compiled for a law enforcement purpose, EPA can justify using Exemption 7(A) only if it can demonstrate that it subsequently compiled the documents for such a purpose. With no evidence from EPA's Declaration that the documents were compiled by EPA prior to the FOIA request for any collective purpose, let alone

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[18] *See* "The Basics of the Regulatory Process," available at https://www.epa.gov/laws-regulations/basics-regulatory-process (last visited June 2, 2016) ("One of our [EPA's] most significant tools is writing regulations.").

[19] *See, e.g.,* FOIA_0618_Outlook00000084, FOIA_06018_Outlook00002002, and FOIA_06018_Outlook00002008 (related to Newark Bay Ecological Risk Assessment); FOIA_0601800002712, FOIA_0601800002716, FOIA_0601800002719, Tst_0601800000048, Tst_0601800001782, Tst_0601800001783, Tst_0601800001784, Tst_0601800001786, Tst_0601800001787, Tst_0601800001789, Tst_0601800001790, Tst_0601800001793, and Tst_0601800001798 (Empirical Mass Balance Model); FOIA_0601800003161, Tst_0601800000115, Tst_0601800001929, Tst_0601800001930, Tst_0601800001931, Tst_0601800001946, Tst_0601800001947, Tst_0601800001997, Tst_0601800002002, and Tst_0601800004509 (biota analysis); Tst_0601800000170 and Tst_0601800000171 (Conceptual Site Model); Tst_0601800001475 ("Passaic River Designation as Freshwater vs Saline"); and Tst_0601800002000 and Tst_0601800002001 (mercury in fish tissue).

a law enforcement purpose, EPA has failed to satisfy its burden of demonstrating that the documents were compiled for a law enforcement purpose.

B. There is no "pending or prospective" law enforcement proceeding.

Although EPA claims the documents were compiled to "enforce" CERCLA (*see* Mugdan Decl. ¶ 144; EPA's MSJ, p. 33), no relevant enforcement actions were initiated by EPA during the time period in which the withheld documents were created. Similarly, there was no relevant prospective law enforcement proceeding during that period. The earliest document withheld under Exemption 7(A) is dated November 14, 2006. From that date to present, the only known enforcement action initiated by EPA is an unrelated UAO issued in June 2012 to Occidental Chemical Corporation related to the River Mile 10.9 Settlement Agreement.

EPA dismisses the fact, however, that it did not bring any relevant enforcement proceedings during this 10-year period, by arguing that "given the long history of litigation involving the Lower Passaic River the EPA has properly concluded that enforcement proceedings are reasonably anticipated." (EPA's MSJ, p. 36). EPA cites two cases involving FOIA requests related to CERCLA sites in support of this position; however, both were brought **after** EPA had started enforcement proceedings. *See Goodrich Corp. v. EPA*, 593 F. Supp. 2d 184, 193 (D.D.C. 2009) (noting that EPA had issued a UAO prior to FOIA request); *Gen. Elec. Co. v. EPA*, 18 F. Supp. 2d 138, 144 (D. Mass. 1998) (noting that EPA had issued CERCLA § 106 orders prior to the FOIA request).

The situation before this Court, in which no UAO has yet been issued, is clearly distinguishable. To accept EPA's position that a law enforcement proceeding is "prospective" whenever such proceedings may occur (at some unspecified future date) would expand the law enforcement exemption so dramatically that it would thereafter encompass every document created in relation to a CERCLA site. The technical documents in question here were created to

help select and implement an appropriate cleanup of the Passaic River, not to develop arguments or positions for future enforcement proceedings. If EPA's argument were accepted, **every** document related to a CERCLA-site cleanup (including the technical documents at issue here) would be covered by the law enforcement exemption. For example, EPA could use a technical document as support for its claim that its chosen remedy is appropriate, whereas PRPs could use the document to show the opposite or to show that their responsibility is less than alleged. Accordingly, because EPA has not demonstrated that there is a prospective law enforcement proceeding, it has improperly withheld the requested documents under Exemption 7(A).

C. EPA failed to provide adequate support for its alleged justification for withholding the requested documents.

Further, EPA's purported justification for withholding the requested documents is insufficient under both general FOIA law and under the standard required for Exemption 7(A). Specifically, as addressed earlier, EPA has failed to provide a particularized description of how each document falls within a statutory exemption, instead providing a single justification that purports to cover all withheld documents. Not only is this insufficient under FOIA, but the alleged justification also fails to meet the "articulable harm" necessary to withhold a document under Exemption 7(A).

With regard to Exemption 7(A), EPA specifically argues that releasing the withheld documents would "provide the CPG and other interested parties with undue insight into EPA's investigation of the Lower 8.3 Miles and the development of the enforcement case." (Mugdan Decl. ¶ 145*; see also Vaughn* index Categories 8, 9, 10, 12, 15, and 18). The harm that EPA claims will stem is that "[t]his insight could enable the CPG and other PRPs to devise litigation and/or enforcement avoidance strategies to counter EPA's enforcement effort and impair EPA's ability to ultimately present its case." (Mugdan Decl. ¶ 145; see also *Vaughn* index Categories 8,

9, 10, 12, 15, and 18). Because this single justification fails to adequately explain why each document withheld satisfies the purported exemption, it is insufficient under FOIA.

1. EPA has failed to demonstrate an adequate, specific "articulable harm" it could reasonably expected to be caused by release of the requested documents.

The conclusory harm EPA says would result from providing PRPs an advantage in civil litigation is not the type of "articulable harm" sufficient harm to satisfy Exemption 7(A). In *Goodrich Corp. v. EPA*, another CERCLA case involving a PRP's request for possibly exonerating documents, the court rejected a similar argument raised by EPA. The Court held that "a conclusion that a civil litigation (or discovery) advantage potentially realized by the production of a document is enough to warrant protection under Exemption 7(A) would risk unbounded expansion of the law enforcement exemption." 593 F. Supp. 2d at 195. Further, "it is not sufficient for an agency merely to state that disclosure would reveal the focus of an investigation; it must rather demonstrate *how* disclosure would reveal that focus." *Sussman v. U.S. Marshals Serv.*, 494 F.3d 1106, 1114 (D.C. Cir. 2007) (citing *Campbell v. Dep't of Health & Human Servs.*, 682 F.2d 256, 265 (D.C. Cir. 1982)). This requires the agency provide "specific information about the impact of the disclosures." *Id.* at 1114.

EPA improperly claims that to demonstrate an articulable harm it need only show that disclosing the requested documents would provide "advance access to the government's case." (*See* EPA's MSJ, pp. 35-37). Pure knowledge, however, is insufficient to satisfy the exemption. It is not this knowledge alone itself that the courts analyze, but whether the use of that knowledge could "jeopardize any future law enforcement proceedings." *See NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 236 (1978). As the cases cited by EPA explain, knowledge could only interfere with future law enforcement proceedings if the party obtaining the knowledge could use it improperly to intimidate or harass potential witnesses, tamper or destroy

evidence, or "construct" defenses. *See, e.g., id.* at 240-41. None of these rationales for withholding documents is applicable here. There is simply no way any party could use the technical documents withheld to intimidate witnesses or destroy evidence.

Here, EPA does not explain how release of the documents would lead to the purported justifications. Accordingly, EPA has failed to meet its burden to demonstrate the applicability of Exemption 7(A) to the requested documents.

2. EPA improperly considered the requester's identity when deciding to withhold documents.

EPA's attempt to withhold documents from the CPG because the requesting parties were PRPs at the site in question (*see* EPA's MSJ, pp. 35, 36; Mugdan Decl. ¶ 145) is contrary to FOIA's intended purposes of providing transparency in governmental affairs. If accepted, EPA's position would create a barrier to this transparency, and would in fact make governmental affairs least transparent to the people most concerned.

Indeed, this precise withholding justification was rejected in *Horsehead Industries, Inc. v. EPA*, 999 F. Supp. 59 (D.D.C. 1998). The court rejected EPA's argument that it could read a FOIA request from a PRP at a CERCLA request more narrowly than it would read the same request made by a non-PRP. The court acknowledged that "one occasionally finds evidence of judicial disapproval when FOIA requests have been used in lieu of discovery" but clarified that there is "no legal basis for such commentary." 999 F. Supp. at 67. The court emphasized how "FOIA is founded on an equality principle or non-discrimination principle that makes irrelevant . . . the identity of [the] requester or his or her particular interest in the information sought." *Id.* As such, "all members of the public, including those who happen to be parties litigant against their government, are entitled to access to government records subject to disclosure under FOIA." *Id.* (emphasis added).

In fact, the court clarified, EPA is "obliged" to read FOIA requests "more generously than [it] might read an identically-worded discovery request . . . even if the FOIA request is made by an adverse party or a potentially adverse party in litigation against the Government." *Id.* at 68 (emphasis in original). The court held that "EPA lacked a reasonable basis for withholding" the documents and held that "when a FOIA request is made to further a complainant's litigation objective against the government, an agency may not discriminate and construe such a request more narrowly . . . than a request made by a non-litigant complainant." *Id.* Likewise, EPA cannot justify withholding records simply because the CPG is potentially made up of PRPs.

VII. This Court May Order Several Remedies to Ensure that EPA Releases All Requested Records.

The CPG therefore respectfully requests this Court to deny EPA's motion for summary judgment. In light of EPA's inadequate justification for withholding the documents, the agency should be ordered to release all requested documents in un-redacted form.

The Court also has various remedies it could order to ensure that EPA releases all requested documents. Under Fed. R. Civ. P. 56(d), the CPG asks the Court to allow the CPG to take limited discovery to develop the factual record to determine the universe of withheld records and properly assess the applicability of the claimed exemptions. EPA should also be required to submit a sufficient declaration and *Vaughn* index.

Discovery is warranted. The CPG has appealed EPA's production of documents administratively and has instituted this FOIA lawsuit, yet EPA still is improperly withholding certain documents. EPA has showed its general attitude of lack of responsiveness and non-disclosure and its refusal to create a satisfactory *Vaughn* index over the course of over two years

through multiple FOIA requests, administrative appeals, and its current *Vaughn* index. EPA has failed to meet its burden of justifying that the withheld records fall under a FOIA exemption.[20]

FOIA also authorizes a court to examine withheld documents *in camera* to determine whether the documents should be disclosed. 5 U.S.C. § 552(a)(4)(B). Courts have generally disfavored such review and undertake it only when the affidavits or the *Vaughn* index are insufficient. *Manna II*, 832 F. Supp. at 874; *se e also Int'l Collision Specialists, Inc. v. IRS*, No. 93-2500, 1994 WL 395310, at *3 (D.N.J. Mar. 4, 1994); *Berger v. I.R.S.*, 487 F. Supp. 2d 482, 494 (D.N.J. 2007), *aff'd*, 288 F. App'x 829 (3d Cir. 2008).

CONCLUSION

For the foregoing reasons, genuine issues of material fact prevent this Court from granting EPA's motion for summary judgment, and it should be denied.

Respectfully submitted,

Dated June 10, 2016

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[20] If this Court does not deny EPA's motion for summary judgment outright, then the CPG should be permitted to supplement this Opposition after discovery to adequately respond to EPA's motion for summary judgment.